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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON
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Cause Nos. PD-0695-20, PD-0696-20, PD-0697-20

FILED
COURT OF CRIMINAL APPEALS
3/1/2021
DEANA WILLIAMSON, CLERK

In the Court of Criminal Appeals
for
The State of Texas

David Earl Spillman, Jr.
v.
The State of Texas

Arising from Cause Nos. 05-19-00530-CR, 05-19-00531-CR, and 05-19-00532-CR, respectively
in the Dallas Court of Appeals

Appellant's Brief

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Oral Argument is Requested.

Identity of Parties and Counsel

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To the honorable judges of the Court of Criminal Appeals for the State of Texas:

Record References

This Court's Cause Number	PD-0695-20	PD-0696-21	PD-0697-22
Court of Appeals Cause Number	05-19-00530-CR	05-19-00531-CR	05-19-00532-CR
Trial Court Cause Number	31765	31766	31767
Charge	Assault on a Public Servant	Assault on a Public Servant	Possession of Controlled Substance
Complainant	Carper	Reeves	N/A
Sentence	50 years	50 years	60 years

The Clerk's Record in PD-0695-20, Court of Appeals No. 05-19-00530-CR, Trial Court Cause Number 31765 (the alleged assault against Carper) will be referred to as CR65. So, for example, *CR65 23* would be the 23rd page of that record.

The Clerk's Record in PD-0695-21, Court of Appeals No. 05-19-00531-CR, Trial Court Cause Number 31766 (the alleged assault against Reeves) will be referred to as CR66.

The Clerk's Record in PD-0695-22, Court of Appeals No. 05-19-00532-CR, , Trial Court Cause Number 31767 (the PCS case) will be referred to as CR67.

The reporter's record in all three cases is the same. Record references will be to the volume and page. So, for example, RR vol. 8 p. 1 would be the first page of volume eight of the reporter's record.

Statement of the Case

Proceeding in the trial court:	Mr. Spillman had a jury trial on three indictments: Cause Number 31765 (Assault on Public Servant, Complainant Carper) (CR65 8); Cause Number 31766 (Assault on Public Servant, Complainant Reeves) (CR66 8); and Cause Number 31767 (Possession of Controlled Substance) (CR 67 8).
Disposition by the trial court:	The jury convicted Mr. Spillman on March 27, 2019, and sentenced him to: 50 years in prison on Cause Number 31765 (CR65 84); 50 years in prison on Cause Number 31766)CR66 80); and 60 years in prison on Cause Number 31767 (CR67 79).
Disposition by the Court of Appeals:	The Fifth Court of Appeals, in an unpublished opinion issued on July 16, 2020, affirmed the judgment of the trial court in Cause Numbers 05-19-00530-CR, 05-19-00531-CR, and 05-19-00532-CR. *Spillman v. State*, 05-19-00530-CR, 2020 WL 4013142, at *3 (Tex. App.—Dallas July 16, 2020, pet. granted) ("Opinion Below").
Grant of discretionary	This Court granted discretionary review on the only ground raised, which is whether the evidence is

review by this Court:	legally sufficient to support Petitioner's convictions for two assaults on public servants.

Statement Regarding Oral Argument

Mr. Spillman did not request oral argument because he filed his *Petition for Discretionary Review* pro se as an inmate. Now that he has counsel, Mr. Spillman hopes the court will grant oral argument, as the issues—not only whether the evidence of his criminal responsibility and his recklessness was legally sufficient to convict him, but also what evidence is required to prove causation and recklessness—are of great and far-reaching importance to the jurisprudence of the State.

Issue Presented

The issue presented is whether the evidence is legally sufficient to support Spillman's convictions of Assault on a Public Servant.

A subsidiary question is what to do about it, if the evidence is legally insufficient on one or both of the convictions.

Statement of Facts

Mr. Spillman was stopped by the police. RR vol. 8 p. 47. In the course of the interaction, the police asked him to remove his left shoe. RR vol. 8 p. 43. When he did so, they thought he was trying to conceal something. RR vol. 8 p. 44. They tried to stop him, he resisted. RR vol. 8 p. 44. A brief scuffle ensued in which two officers were injured. RR

vol. 8 pp. 25–86, RR vol. 8 pp. 111–36. Officer Carper blew out his knee, RR vol. 8 p. 53, and Officer Reeves scraped his elbow, RR vol. 8 p. 122, when Reeves threw Spillman to the ground. RR vol 8 pp. 53, 121.

Summary of the Argument

The evidence is not legally sufficient to support Petitioner's convictions for two assaults on public servants. The State was required by the hypothetically correct jury charge to prove:

1. That Mr. Spillman was criminally responsible for either officer's injuries—that is, that his conduct was a cause of those injuries and that either his conduct was sufficient to cause those injuries or that a concurrent cause (the officers' own conduct) was insufficient to cause those injuries; and
2. That Mr. Spillman recklessly caused those injuries—that is, that he was conscious of, but disregarded, a substantial and unjustifiable risk that his conduct would result in the officers' injuries.

Even viewing the evidence in the light most favorable to the state, no reasonable juror could have found either of these things beyond a reasonable doubt.

Spillman's own conduct by itself was clearly insufficient to cause the officers' injuries, and Reeves's conduct was clearly sufficient to cause those injuries, so that the State is unable to prove criminal responsibility beyond a reasonable doubt; and there was no evidence from which a jury

could find that Spillman was conscious of any unjustifiable risk of harm to the officers from his conduct, so that the State cannot prove recklessness beyond a reasonable doubt.

Argument & Authorities

Argument and Authority Applicable to All Unproven Elements

Legal Insufficiency Generally

Evidence is *legally insufficient* if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

> [S]ufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case.

Malik v. State, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

Here the application paragraphs read:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 12th day of August, 2016, in Hunt County, Texas, the defendant, DAVID EARL SPILLMAN, JR., did then and there intentionally or knowingly or recklessly cause bodily injury to Kendall Reeves, by causing Kendall Reeves right elbow to strike the ground during a physical altercation, and the defendant did then and there know that the said Kendall Reeves was then and there a public

> servant, to-wit: Greenville Police Department Officer, and that the said Kendall Reeves was then and there lawfully discharging an official duty, to-wit: placing the defendant under arrest, then you will find the Defendant "Guilty" of Assault Against a Public. Servant as charged in the indictment.

(CR.65 77–78) and

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 12th day of August, 2016, in Hunt County, Texas, the defendant, DAVID EARL SPILLMAN, JR., did then and there intentionally or knowingly or recklessly cause bodily injury to STEVEN CARPER, by causing pain to Steven Carper's left knee during a physical altercation, and the defendant did then and there know that the said Steven Carper was then and there a public servant, to-wit: Greenville Police Department Officer, and that the said Steven Carper was then and there lawfully discharging an official duty, to-wit: placing the defendant under arrest, then you will find the Defendant "Guilty" of Assault Against a Public Servant as charged in the indictment.

(CR66 73–74). This jury charge:

- Is authorized by the indictments (CR 65 8; CR66 8);
- Accurately sets out the law contained in section 22.01 of the Texas Penal Code;
- Does not unnecessarily increase the State's burden of proof; and
- Adequately describes the offense for which Mr. Spillman was tried.

Malik, 953 S.W.2d at 240.

The charge includes an abstract instruction on "concurrent causation," but does not include an application paragraph thereon. *See*

Mattox v. State, 874 S.W.2d 929, 930 (Tex. App.—Houston [1st Dist.] 1994, no pet.). This abstract instruction on concurrent cause is sufficient to bring concurrent causation into issue.

The abstract paragraphs of a jury charge serve as a glossary to help the jury understand the meaning of concepts and terms used in the application paragraphs of the charge. Plata v. State, 926 S.W.2d 300, 302 (Tex. Crim. App. 1996), *overruled on other grounds by* Malik, 953 S.W.2d 234. "[T]he inclusion of the law of parties in the abstract portion of the jury charge[,]" for example, "was enough for the law of parties to be taken into account in a sufficiency review." *Yzaguirre v. State*, 394 S.W.3d 526, 529 (Tex. Crim. App. 2013).

Elements that the State must Prove

The State must prove criminal responsibility.

At issue in every criminal action is the *criminal responsibility* of the actor. *See* Tex. Penal Code § 1.07(a)(2) ("'Actor' means a person whose criminal responsibility is in issue in a criminal action"); Tex. Penal Code ch. 8 (describing "general defenses to criminal responsibility."); Tex. Penal Code ch. 9 (describing "justification excluding criminal responsibility").

The State must prove causation.

An element of any assault causing bodily injury under section 22.01(a)(1) of the Texas Penal Code is that the actor *caused* bodily injury to the complainant. Tex. Penal Code § 22.01(a)(1).

The State must disprove a sufficient concurrent cause.

Section 6.04 of the Texas Penal Code limits criminal responsibility for "causing" injury to those situations in which either a) the actor's conduct alone was sufficient to cause the injury, or b) the actor's conduct alone was insufficient to cause the injury, any concurrent cause was also insufficient, but the two causes combined were sufficient. Tex. Penal Code § 6.04(a).

> A concurrent cause is "another cause" in addition to the actor's conduct, an "agency in addition to the actor." See S. Searcy and J. Patterson, Practice Commentary, V.T.C.A. Penal Code, Sec. 6.04.

Robbins v. State, 717 S.W.2d 348, 351 fn.2 (Tex. Crim. App. 1986).

Causation is an element of Assault on a Public Servant. Concurrent causation, which negates both causation and criminal responsibility, is not an affirmative defense, Tex. Penal Code § 2.04, on which the defendant would have a burden of proof.

Accordingly, the State must, where there are concurrent causes, prove beyond a reasonable doubt either of these things:

- That the actor's conduct alone was sufficient to cause the injury; or
- That the actor's conduct alone was insufficient to cause the injury, but any concurrent cause was also itself insufficient to cause the injury.

Nor—intermediate court opinions notwithstanding—is concurrent causation a defensive issue. It is instead an integral part of the definition of *causation*, as well as of *criminal responsibility*.

If there is no concurrent cause, the actor's conduct must have caused the injury to lead to criminal responsibility; in that situation the State must establish beyond a reasonable doubt that his conduct alone *caused*—which subsumes *was not clearly insufficient to cause*—the injury.

Here the issue of concurrent causation was raised by Reese's and Carper's testimony and by the video evidence. The trial court correctly instructed the jury on the law of concurrent causation.

Where, as here, the evidence shows concurrent causes, the State must prove beyond a reasonable doubt either a) that the defendant's conduct was not clearly insufficient, or b) that the other causes were not clearly sufficient to cause the result. Tex. Penal Code § 6.04(a).

"A jury charge on causation is called for only when the issue of concurrent causation is presented." *Hughes v. State*, 897 S.W.2d 285, 297 (Tex. Crim. App. 1994). Here the trial court gave the abstract

instruction on criminal responsibility and causation, immediately preceding the application paragraph in each case:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.
>
> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that a different offense was committed or a different person or property was injured, harmed, or otherwise affected.

CR65 77; CR66 73.

Concededly, the better practice for the trial court would have been to include concurrent causation in the application portion of the charge, but we assume that jurors read, understand, and follow all of a jury charge, and the inclusion of concurrent causation in the abstract portion of the jury charge was enough for it to apply to this legal-sufficiency review.

This abstract instruction provides a definition of both *cause*, which is an element of assault, and of *criminal responsibility*, which is the ultimate issue in the culpability phase of any criminal trial. The jury was required to take into account the Court's criminal responsibility instruction in

order to find Mr. Spillman criminally responsible for causing injuries to Reeves or Carper, if only to understand what "cause" meant in the application paragraph that followed.

The State had to prove beyond a reasonable doubt that the result would not have occurred but for Spillman's conduct, and had to *disprove* beyond a reasonable doubt either that the concurrent cause was clearly sufficient to produce the result or that the actor's conduct was clearly insufficient to produce the result.

That is, the State had to prove beyond a reasonable doubt either that Reeves's and Carper's conduct combined was not clearly sufficient to cause Reeves's or Carper's injuries, *or* that Mr. Spillman's conduct was not clearly insufficient to cause Reeves's or Carper's injuries.

Another way to look at this is as a but-for-proportional-response test: a person is liable for the results that would not have occurred but for his conduct, *provided* that someone else does not respond disproportionately to the actor's insufficient conduct with a cause that is clearly sufficient to cause the result.

What it is not is a simple but-for test. The State argued at trial:

> Kendall Reeves would not have landed on the ground elbow first but for this altercation.

> That's clear. Okay? Officer Carper would not have a ruptured ACL but for this altercation. All right? And the defendant is a but-for cause in that. If he wasn't there and involved in this, they would not injured. That is what's called causation.

RR vol. 8 p. 187.

That is indeed *but-for causation*, but it is not sufficient causation for imposing criminal responsibility. If the actor's conduct and the other's conduct are both clearly sufficient to cause the result, if both are clearly insufficient separately (but sufficient together), or if the actor's conduct is clearly sufficient and the other's conduct clearly insufficient, the actor is liable for the result *because the other did not respond disproportionately* and cause some injury that would not have been caused by the actor alone. But it is not permissible under section 6.04 for the State to punish someone for an injury where his conduct was not sufficient to cause the injury, but some concurrent cause was.

The State must prove recklessness.

Criminally negligent conduct that causes injury is not assault. Texas Penal Code section 22.01(a)(1) imposes liability for intentionally, knowingly, or recklessly causing bodily injury. Tex. Penal Code § 22.01(a)(1).

There was no evidence or argument below that Spillman intentionally or knowingly caused injury to Carper or Reeves. The mens rea at issue is *recklessness*, which "requires the defendant to actually foresee the risk involved and to consciously decide to ignore it.… This combination of an awareness of the magnitude of the risk and the conscious disregard for consequences is crucial." *Williams v. State*, 235 S.W.3d 742, 752–53 (Tex. Crim. App. 2007).

To determine whether conduct is reckless, this Court must look to:

> 1) whether the act, when viewed objectively at the time of its commission, created a "substantial and unjustifiable" risk of the type of harm that occurred,
> (2) whether that risk was of such a magnitude that disregard of it constituted a gross deviation from the standard of care that a reasonable person would have exercised in the same situation,
> (3) whether the defendant was consciously aware of that risk, and
> (4) whether the defendant consciously disregarded that risk.

Id. at 755–56.

Application to the Specific Allegations

Even viewing the evidence in the light most favorable to the State, no reasonable juror could have found beyond a reasonable doubt:

1. That Spillman was criminally responsible for the injury to either officer; or
2. That Spillman caused either officer's injury recklessly.

No reasonable juror could have found beyond a reasonable doubt that Spillman caused or was criminally responsible for Carper's injury.

The State failed to disprove that Spillman's conduct was clearly insufficient, and the officers' conduct clearly sufficient, to cause Carper's injury. There was no evidence from which a reasonable juror could find beyond a reasonable doubt that it was not true that Mr. Spillman's conduct was clearly insufficient to cause either officer's injury, and Reeves and Carper's conduct was clearly sufficient to cause both officers' injury.

Spillman's conduct was by itself clearly insufficient to cause the complainant's injuries.

A close review of the record in this case will show that Spillman's conduct was by itself clearly insufficient to cause either Reeves's or Carper's injury.

Spillman's conduct was described as follows:

- "Immediately tenses up" RR vol. 8 p. 50
- Tried to twist out of Carper's grip and bring his closed hand up parallel with his ear or so" RR vol 8 pp. 50–51
- "Pulling and jerking" RR vol 8 p. 52
- "This arm attempts to come up and over my shoulder here." RR vol. 8 p. 52
- "Trying to go between us," RR vol. 8 p. 53.

These actions were clearly insufficient by themselves to cause either Reeves's scraped elbow or Carper's blown-out knee.

Those injuries required conduct by the officers to cause them. Carper and Reeves had agency, and could choose the degree of force. They chose a degree of force likely to cause bodily injury to them as well as Spillman. If the officers had not "escalate[d] the level of force," RR vol. 8 p. 125, then neither of them would have been injured.

Reeves's and Carper's conduct was sufficient to cause Carper's injury.

Meanwhile, Reeves was pushing Carper and Spillman. RR vol. 8 pp. 52–53. Reeves wound up taking Spillman and himself to the ground with a hip throw, RR vol. 8 p. 121, while Carper was still standing up, RR vol. 8 p. 125.Carper testified that while officer Reeves was pushing him and Mr. Spillman, Carper planted his leg and felt a pop and a grind. RR vol. 8 p. 53. Reeves's and Carper's conduct combined was clearly sufficient to cause Carper's injury. At the very least, there is an unresolved reasonable doubt about whether Reeves's and Carper's conduct was clearly sufficient to cause Carper's injury.

No reasonable juror could have found beyond a reasonable doubt that Spillman caused or was criminally responsible for Reeves's injury.

The State failed to disprove that Spillman's conduct was clearly insufficient, and the officers' conduct clearly sufficient, to cause Reeves's injury. There was no evidence from which a reasonable juror could find beyond a reasonable doubt that it was not true that Mr. Spillman's conduct was clearly insufficient to cause either officer's injury, and Reeves and Carper's conduct was clearly sufficient to cause both officers' injury.

As discussed above at 20, Spillman's conduct alone was clearly insufficient to cause injury to Reeves. Reeves testified that it was his hip throw that took Mr. Spillman and himself to the ground, where he scraped his elbow. RR vol. 8 p. 121. Thus it was Reeves's own conduct that brought his elbow in contact with the ground, causing his injury.

Reeves's conduct was clearly sufficient to cause that injury.

No reasonable juror could have found beyond a reasonable doubt that Spillman recklessly caused either officer's injury.

"Whether a defendant's conduct involves 'an extreme degree of risk' must be determined by the conduct itself and not by the resultant harm.

Nor can criminal liability be predicated on every careless act merely because its carelessness results in death or injury to another." *Williams,* 235 S.W.3d at 753. That is, the fact that Carper and Reeves *were* injured does not determine whether the risk of that happening was substantial and unjustifiable. Flukes occur.

Even if conduct involved extreme risk, whether there was a substantial and unjustifiable risk is a separate question from whether the defendant was consciously aware of that risk. It is not enough that there was a substantial risk that the defendant disregarded, but he must have done so consciously.

In the court of appeals, the State argued that the risk of injury to Reeves and Carper was a "risk the jury reasonably found Appellant could foresee under the circumstances." *State's Brief Below* at 14. And that may well be so. But "could foresee" is not c*onsciously foresaw.* Conduct even in the face of a substantial and unjustifiable risk, if the actor was not *consciously aware* of that risk or did not *consciously disregard* that risk, is not reckless conduct, but is merely criminally negligent:

> A person acts with criminal negligence, or is criminally negligent, with respect to … the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the

> standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Tex. Penal Code § 6.03(d).

Conscious awareness of risk is usually proven by circumstantial evidence. Here, though, there is no circumstantial evidence of such awareness. From the beginning of the scuffle, when Carper grabbed Spillman's arm, to the end, when Reeves took Spillman to the ground with a hip throw, these events all occurred in a matter of a few seconds. RR vol. 8 pp. 76–77; State's Exhibits 2, 5. There is no evidence that in that brief time Spillman thought about, much less became consciously aware of and consciously disregarded, any risk to the officers. Nothing in the State's evidence proved that Spillman acted with recklessness. Nothing that Spillman said or did, before, during, or after the scuffle, indicated that he was aware of any risk that Carper and Reeves might be injured.

Even the rationale of the court below does not support there being legally sufficient proof of recklessness. That court wrote, "Even if appellant only intended to conceal evidence and prevent his arrest, he disregarded a substantial risk that his struggling could result in bodily injury to any of the officers involved in his arrest." *Opinion Below* at *3. This does not address the question of whether Spillman was *aware* of

that substantial risk. The recklessness question is not whether he *could have* perceived a substantial and unjustifiable risk, *id.* (opinion below at *3), but whether he was conscious of that risk, and consciously disregarded it.

While evidence that there was a substantial and unjustifiable risk is not itself proof that a particular person was aware of that risk, there *may* be some risks that are so great that it seems obvious that the actor was aware of them. In *Salinas v. State*, for example, this Court held, "we may presume that appellant was aware of the risk of injury or death by having a loaded, cocked pistol and exhibiting it." *Salinas v. State*, 644 S.W.2d 744, 746 (Tex. Crim. App. 1983).

The risk of waving a cocked pistol at someone is much more obvious than the risk of playing "forcible keep-away we'll call it, by not responding to the officer when he grabbed his wrist, and instead flinging his arm up and then trying to move away." RR vol. 8 p. 191.

More importantly, though, the presumption in *Salinas* was in that defendant's favor (it resulted in a reversal on appeal). It is doubtful that a court could presume an actor, to his detriment, to be conscious of some risk simply because of the magnitude of the risk, without some evidence, direct or circumstantial, that he was aware of it.

Different people have different levels of awareness. A person who has never seen winter may not be consciously aware of things that seem obvious to people who live in Wisconsin. A defendant with an IQ of 80 may not be consciously aware of things that seem obvious to judges of this Court, and those judges may not be consciously aware of things that seem obvious to the defendant.

Becoming *consciously aware* of something is *learning* it, and some people learn things only experientially; it is not obvious to them that something will happen until it has happened to them. It may never occur to such a person that tussling with the police risks his own death, much less injury to the officers.

Here, the outcome was a fluke that did not accurately reflect the risk. At trial the State described, probably appropriately, the outcome of Spillman's conduct as unusual. The State argued:

> Resisting arrest does not always, as you heard Kendall Reeves talk about, result in injuries to two people. In fact, most of the time it doesn't.

RR vol. 8 p. 192. On direct examination by the State Reeves had testified:

> Q. Have you been in incidents where people have tried to, I guess, resist or fight or something like that?
> A. Yes.

> Q. Do they always end up in you having bruised and bloody elbows, though?
> A. No.
> Q. Have you performed takedowns before that didn't result in you getting an injury like this?
> A. Yes.

RR vol. 8 pp. 122–23. This argument, and this testimony, militate against the risk of injury to a public servant in Spillman's circumstances having been substantial. Even if there was a substantial risk, Reeves's testimony and the State's argument militate against it being so great that any person might be presumed to be conscious of it.

There was no evidence from which a reasonable juror could conclude beyond a reasonable doubt that Mr. Spillman was aware of but consciously disregarded a substantial and unjustifiable risk that if he tensed up Carper and Reeves would escalate the force to the point where one of them was injured.

The Assault on a Public Servant cases should be reversed and rendered.

While the jury was instructed on Resisting Arrest as a lesser-included offense of Assault on a Public Servant (CR65 78, CR66 74) it is not such. A hypothetically correct jury charge would not have included this lesser-included offense.

The Code of Criminal Procedure defines an offense as a lesser-included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or (4) it consists of an attempt to commit the offense charged or an otherwise included offense. Tex.Code Crim. Proc. Ann. art. 37.09. Resisting Arrest does not qualify as a lesser-included offense of Assault on a Public Servant under article 37.09.

> A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another.

Tex. Penal Code § 38.03(a). "Prevents or obstructs" is an element of resisting arrest, but not of assault.

"From effecting an arrest, search, or transportation" is likewise not an element of assault—while "placing the defendant under arrest" was pled in the indictment here, it is not an element of an assault, not

something that the State had to prove, and indeed there was no evidence of it.

"By using force against" is also an element of resisting arrest, but not of assault—a person can commit assault by *causing injury* without *using force* against the complainant.

Under this Court's cognate-pleadings test, *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007), if the Assault on a Public Servant indictment pled all of the elements of resisting arrest, differing only in mental state or serious injury, then resisting arrest would be a lesser-included offense the Assault on a Public Servant alleged in this indictment. It and is not. There was no allegation that Spillman prevented or obstructed Carper or Reeves from effecting an arrest, search, or transportation, and no allegation that Spillman used force against Carper or Reeves.

Even if Resisting Arrest were a lesser-included offense of Assault on a Public Servant as charged (on some theory that "recklessly causing injury" is necessarily "using force"—it is not—and that the indictment's description of the official duty as "placing the defendant under arrest" was implicitly an allegation that Spillman obstructed an *arrest*), this indictment did not authorize a conviction for resisting a

search, and the evidence of Resisting Arrest was legally insufficient, as the uncontroverted evidence was that Carper and Reeves were attempting to *search* Spillman when they were injured, and only sought to arrest him later.

The state's argument at trial was, "If he's under restraint, then he is arrested," but this is false—he is only arrested if he is under restraint by someone who is *arresting* him. CR65 77, CR66 73. Mere restraint, as might occur in an investigative detention, does not satisfy the "arrest" element of Resisting Arrest, which "contemplates resisting an effort to implement traditional arrest and not, as appellant argues, resisting an investigative detention or stop." *Molina v. State*, 754 S.W.2d 468, 474 (Tex. App.—San Antonio 1988, no writ).

In other words, the indictment was insufficient to plead Resisting Search and the proof that officers were trying to restrain Spillman so that they could find out what was in his hand was legally insufficient to prove Resisting Arrest.

Spillman's remedy on the Assault on a Public Servant cases is rendition of judgments of acquittal.

Any remaining cases should be reversed and remanded for resentencing.

A determination that the evidence is legally insufficient means that the case should never have been submitted to the jury. *Clewis v. State*, 922 S.W.2d 126, 132–33 (Tex. Crim. App. 1996), overruled on other grounds by *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010).

Here, the jury had before it the two Assault on a Public Servant cases when it considered punishment for them and the Possession of a Controlled Substance case. Nothing in the jury charge (CR67 87–88) directed them not to take into account the other convictions in setting the sentence on any one case.

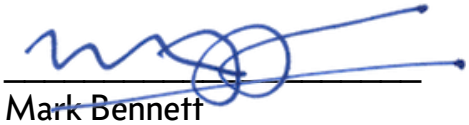
Because one or both of the Assault on a Public Servant cases should never have been submitted to the jury, so that the jury should not have had those convictions to take into account when sentencing, please reverse the remaining case or cases, and remand them for new trials on sentencing.

Conclusion and Prayer

Because the evidence in the two Assault on a Public Servant cases was legally insufficient, please reverse and render each of those cases, and remand any cases that remain for a new trial on punishment.

Respectfully submitted,

Bennett & Bennett, Lawyers
By:



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A true and correct copy of the foregoing brief was served on all parties and counsel of record as required by the Texas Rules of Appellate

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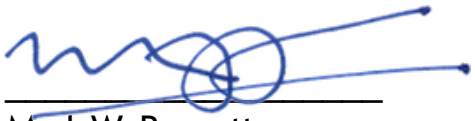

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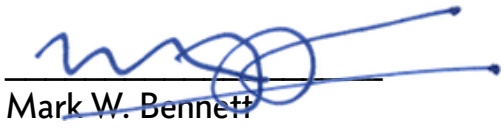

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